STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of MERIT OIL CORPORATION for Revision of a Determination or for Refund of Motor Fuel Tax under Article 12-A of the Tax Law for the Period March 1, 1986 through December 31, 1987.	:	DETERMINATION DTA NO. 809049

Petitioner Merit Oil Corporation, 551 West Lancaster Avenue, Haverford, Pennsylvania 19041 filed a petition for revision of a determination or for refund of motor fuel tax under Article 12-A of the Tax Law for the period March 1, 1986 through December 31, 1987.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 16, 1992 at 9:15 A.M., with all briefs submitted by June 22, 1992. Petitioner appeared by Morrison & Foerster, Esqs. (Paul H. Frankel and Hollis Hyans, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUE

Whether petitioner is entitled to a refund of taxes paid on gasoline it sold in New York City as "leaded" gasoline subject to a one cent per gallon tax by the City of New York because said taxes were paid in error.

FINDINGS OF FACT

Petitioner, Merit Oil Corporation, and the Division of Taxation ("Division") submitted proposed findings of fact which are incorporatedherein. However, petitioner's proposed finding of fact "8" has been modified to more accurately reflect the record.

Petitioner in this case is Merit Oil Corporation ("Merit").

In the early 1980's, retail service stations in the United States provided a variety of types of gasoline, including a premium leaded fuel, a regular leaded fuel and a regular unleaded fuel.

Regular unleaded was fuel with an octane level of 86-87 octane, and premium referred to a higher octane level. After a time, premium leaded fuel was eliminated and stations began selling only regular leaded, premium unleaded and regular unleaded. The trend was away from leaded fuel, and by 1986 very few stations still carried leaded fuel.

On January 1, 1986, the Federal standards for leaded fuel changed, so as to allow only a maximum of one tenth (0.10) of a gram of lead per gallon. "Leaded gasoline" was defined as containing lead in the range of 0.05 grams of lead per gallon to 0.10 grams of lead per gallon. In order to qualify as unleaded gasoline under these Federal regulations, the gasoline had to contain less than 0.05 grams per gallon.

The New York City one-cent tax applies to gasoline with 0.50 grams of lead per gallon. During the period in issue, there could not have been any stations selling gas subject to the one-cent tax, since gasoline with 0.50 grams of lead would violate Federal standards. No company affiliated with the New York State Petroleum Council or the American Petroleum Institute was selling gas containing more than 0.10 grams, the then Federal limit. Yet, some of these companies were indeed selling gasoline denominated "leaded", pursuant to Federal regulation; signs posted at these stations referred to the gasoline with up to 0.10 grams of lead per gallon as leaded. However, other companies not affiliated with the New York State Petroleum Council or the American Petroleum Institute were not informed of the change and continued, like petitioner, to market "leaded" gasoline even though the gasoline they were selling had a lead content of between 0.05 and 0.10 grams. The identity of these companies was not divulged in the record.

During the period in issue, petitioner sold leaded regular fuel, unleaded premium fuel and unleaded regular fuel. These appellations were governed by Federal standards.

Petitioner set its prices as follows. Each gasoline station manager went out two days a week to ascertain competitors' prices for a two-mile radius. This information was communicated by facsimile transmission to Mr. Pate, Senior Vice President of Marketing, who analyzed it and set prices appropriately based on the competitors' prices. Additionally, any time managers saw a competitor reducing or raising its price, they telephoned Mr. Pate. Certain competitors' prices were given more weight than others; price adjustments were made accordingly. All prices were set by Mr. Pate.

Petitioner's prices were not always set at a level to make a profit; rather, the concept of protecting market share was given great weight. Prices were therefore set based on those of the competition.

Mr. Pate was aware of the one-cent tax the City of New York imposed on leaded fuel in 1986 and 1987. He stated that he did not take the tax into consideration when he set prices because the State and Federal taxes were included in the price. Mr. Pate did not respond when asked if the leaded price of the competitors he was trying to beat during 1986 and 1987 was exclusive of the one-cent New York City tax. Mr. Pate stated that he was not informed by anyone in the corporation that it had ceased paying the one-cent tax in 1988.

During 1986 and 1987, Mr. Paul Serpentine was the fuels accounting manager for petitioner, and New York State fuel tax returns were prepared under his supervision. He relied on invoices from suppliers, which identified fuels as leaded regular, unleaded premium and unleaded regular, but contained no further information with respect to precise lead content. If fuel was listed as "leaded" in the invoice, Mr. Serpentine assumed, incorrectly, that it was "leaded" for purposes of the New York one-cent tax.

In January 1988, Mr. Serpentine learned that the one-cent tax was not due and stopped paying the tax. He stated that he calculated tax due by the category of gasoline on invoices. If the invoice stated "leaded" gas, he paid the one-cent tax without regard for lead content.

After petitioner ceased paying the tax, the price at which the product was selling did not change.

During the period in issue, 1986 and 1987, signs at each gasoline pump in all Merit stations within the City of New York indicated the total retail price per gallon of the given grade of gasoline, along with a statement that all applicable taxes were included. An example of such a sign read as follows: "$1.10 all taxes included."

By letter dated May 9, 1988, petitioner requested a refund of the one-cent tax paid on sales of gasoline posted as "leaded" but containing a lead content less than that specified by the City of New York for "leaded" gasoline. The request specified a refund due of $56,851.73 for the months of March, April, May and June 1986.

By letter dated June 29, 1988, petitioner requested a refund of the one-cent tax for the months of July, August and September 1986 in the sum of $39,902.20.

Finally, by letter dated August 23, 1988, petitioner requested a refund of the one-cent tax for the months of October 1986 through December 1987 in the sum of $161,359.10.

The three requests totalled $258,113.03, the same amount set forth by petitioner in its petition.

By letter dated January 10, 1989, the Division denied those refund applications. The denial stated, in pertinent part, as follows:

> "Your request for a refund of the New York City Motor Fuel tax on leaded gasoline (.01¢ a gallon) for the period March 1986 thru December 1987, has been denied.
>
> "Field Audit of your records by our New York District Office has concluded that the fuel in question was 'posted' as leaded and therefore the .01¢ a gallon was passed on to the consumer. If a refund was to be paid it would therefore be to the consumer, not your company."

SUMMARY OF PETITIONER'S POSITION

Petitioner argues that since it was not selling "leaded" fuel as defined by the City of New York, the tax could never have been imposed and the circumstances were such that if the tax had not been paid, the sale would not have been taxable under Article 12-A.

Petitioner further argues that since it was selling gas as "leaded" pursuant to Federal regulations and definitions, it should not be implied that the tax was passed on to purchasers.

Finally, petitioner argues that it priced its "leaded" gasoline on competitors' prices and that all those competitors knew of the New York City definition of leaded gasoline.

CONCLUSIONS OF LAW

A. Petitioner concedes that it was selling a product during 1986 and 1987 which it labeled or "posted" as "leaded" gasoline within the City of New York. The sign on the leaded pumps stated that tax was included in the price. Through negligence on its own part it marketed gasoline with a lead content of between .05 and .10 grams of lead per gallon (the Federal standard for leaded gasoline, see 40 CFR § 80.2[f]) even though the New York City standard for leaded gasoline was .50 grams of lead per gallon or more.

During the period in issue, the City of New York imposed the one cent per gallon excise tax on leaded motor fuel pursuant to Tax Law § 284-b. The pertinent provision of said section states:

> "(a) Any city in the state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city, an excise tax, at the rate of one cent per gallon, upon motor fuel which contains one-half gram or more of tetra ethyl lead, tetra methyl lead or any other lead alkyls per gallon, sold within or for sale within such city by a distributor. A tax imposed pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed by this article" (Tax Law § 284-b[a]).

From the testimony at hearing, it is evident that the marketing department was well aware of the one-cent local excise tax imposed by the City of New York during 1986 and 1987, but the tax department did not become aware of it until 1988. However, the marketing department did not factor taxes when pricing the fuel for sale at the pumps; it only considered profit, competitors' prices and other market conditions, since the taxes were included in the price.

It should be noted that petitioner was partially in compliance with the law and regulations in effect during the period in issue. Tax Law § 1111(d) stated:

> "Where schedules fixing the rate per gallon in multiples of one-tenth of one cent have been promulgated, the price shown on any metered pump or other dispensing device from which such fuel is sold to a purchaser of such fuel, to be delivered directly to a vehicle propelled by any power other than muscular, shall include the tax at the rate so fixed, and the tax commission may by regulation prescribe the manner in which the amount of tax shall be shown for the information of customers by signs or placards on the premises where such fuel is sold."

The regulation promulgated pursuant to this statute stated:

> "**Signs at retail service stations.** [Tax Law, § 1111(d)] (a) Every retail service station operator selling gasoline or diesel motor fuel through a metered pump which shows the price of fuel sold to a customer shall adjust such pump and readjust it from time to time as required so that the price shown thereon shall be the total price including New York State sales tax and any local sales tax which may be applicable.

> "(b) Every operator of a retail service station shall maintain on or in the immediate vicinity of each pump through which gasoline or diesel motor fuel is sold a clear and easily legible sign or placard, readily accessible to customers, showing separately each of the following items with reference to gasoline or diesel motor fuel sold through such pump:
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> "(1) price exclusive of taxes;
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> "(2) United States tax;
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> "(3) New York State motor fuel tax;
>
> "(4) sales tax; and
>
> "(5) total price including all taxes.
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> "All amounts on such sign or placard shall be the applicable amounts per gallon, and all numerals on such sign or placard shall be of uniform size. The amount shown as sales tax shall be the New York State sales tax plus any local sales tax which may be applicable." (20 NYCRR 530.38.)

Petitioner has conceded that it merely stated a price on the pump with the additional words "all taxes included." However, the clear message to the customer was that he was paying all taxes due on each gallon of gasoline purchased.

B. Petitioner argues that since there technically was no tax imposed by the State or City of New York on the fuel marketed by Merit as "leaded" during 1986 and 1987 (see Tax Law § 284-b[a]), it is entitled to a refund of that tax erroneously paid.

Tax Law § 289-c(6) provides, in pertinent part, as follows:

> "Moneys paid in error under this article may be refunded. Where motor fuel, upon which the tax imposed by this article has been paid, is sold, under such circumstances that, if the tax had not been paid, the sale would not have been taxable under this article, the tax may be refunded."

The Division agreed that an application for refund is proper but does not agree that petitioner is entitled to claim the refund. It relies on Tax Law § 289-c(1), which provides as follows:

> "The tax imposed by this article though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed for the purposes of this section to have included the tax."

It seems clear that the marketing department set prices with knowledge that the local one-cent tax was being imposed on its sale of "leaded" fuel during 1986 and 1987 and that the tax department was paying said tax until it learned of its error in 1988. It is equally clear that petitioner posted the price of its gas as including all taxes, confirming the presumption contained in Tax Law § 289-c(1).

Although petitioner does not believe that Tax Law § 289-c(1) applies herein because no tax was imposed by Article 12-A on the gasoline it sold as "leaded", it has not successfully demonstrated that it did not in fact collect the tax from purchasers of the "leaded" fuel who believed they were paying all taxes in the sale price, and pay said tax over to the Commissioner of Taxation and Finance. Petitioner believed it owed the tax and included it in the sales price at the pump. It collected the tax and remitted it to the Commissioner.

Petitioner erroneously collected the one-cent tax from its purchasers and it erroneously paid it over to the Commissioner out of ignorance of the law. It set its prices in accordance with competitors' prices (which may or may not have included the one-cent tax) and thereby lost a penny per gallon of leaded fuel sold from profit and now seeks a refund of same to restore its lost profits.

However, as provided in Tax Law § 289-c(1), the tax paid to the Commissioner herein was paid by petitioner but deemed paid for the account of the purchasers. Although paid in error, and the proper subject of a refund application under Tax Law § 289-c(b), petitioner has not established that it paid the motor fuel tax.

As set forth in the regulation at 20 NYCRR 415.4(b):

> "(2) Every claim must also establish that the motor fuel tax has been borne by the claimant and that such tax is refundable or reimbursable as described in this Part."

Petitioner is not the party that paid the motor fuel tax and, therefore, cannot be the claimant for the refund.

C. Petitioner's evidence does not rebut the presumption that it was collecting tax on behalf of its purchasers. It is of no consequence that taxes were not specifically factored by the marketing department because taxes concededly were included in the prices. The prices did not fluctuate after petitioner stopped paying tax because it was pricing competitively, i.e., at a market rate. Further, there was no evidence that _all_ petitioner's competitors were not collecting the tax.

The evidence presented herein has not rebutted the presumption that the prices displayed on the pumps included the one-cent tax, or that the purchasers did in fact pay that one-cent tax to petitioner, correctly or not, when they paid the purchase price displayed as including all taxes.

Petitioner cited a Supreme Court case, _McKesson Corp. v. Division of Alcoholic Beverages & Tobacco_ (496 US 18, 110 L Ed 2d 17), for the proposition that the question of whether a tax has been passed on to a customer "entails a highly sophisticated theoretical and factual inquiry" which was not made herein. That case, however, is distinguishable because it involved a Commerce Clause violation due to discrimination against interstate commerce by the State of Florida which provided special tax rate reductions for specified products grown in Florida and used in alcoholic beverages produced there. McKesson did not qualify for the reductions and paid the higher taxes. It then sought a refund. The Supreme Court of Florida balked at authorizing the refund because it feared the petitioner would receive a windfall "since the cost of the tax has likely been passed on to [its] customers." The U.S. Supreme Court rejected this notion and said that the "state could not refuse to provide a refund based on sheer speculation that a 'pass-on' occurred" (_id_. at 42).

That was not the case herein, where it has been found that the tax was posted as included in the price and paid by purchasers of the leaded gasoline. Petitioner's argument, in hindsight, that the tax was not imposed on the "leaded" fuel they sold misrepresents the salient facts, i.e., that they charged, collected and remitted the tax in error.

D. The Division's denial of petitioner's three refund applications dated May 9, 1988, June 29, 1988 and August 23, 1988 is sustained.

DATED: Troy, New York
January 28, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE